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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 146.

JOSEPH M. CUNNINGHAM, TRUSTEE; IDA MAY JONES, AND ANDRIEUS A. JONES, PLAINTIFFS IN ERROR,

vs.

CHARLES SPRINGER AND JOHN B. DAWSON, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF OF DEFENDANTS IN ERROR.

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Statement of the Case.

In this action the plaintiffs in error sought the recovery of seventy-five thousand dollars ($75,000) from defendants in error on account of legal services performed by Andrieus A. Jones for and on behalf of the defendants. The evidence in this action disclosed that John B. Dawson was living on a tract of land within the exterior boundaries of the Maxwell land grant; that the Maxwell Land Grant Company had commenced an action in ejectment against the defendant John B. Dawson; that some time prior to the commencement of that action John B. Dawson, having been advised that such

an action was about to be prosecuted against him, made a contract with the defendant Charles Springer, whereby he agreed to convey to Charles Springer an undivided one-half interest in and to all the minerals and coal underlying the surface of his claim in consideration of Charles Springer paying all the expenses of the litigation as well as effecting a sale of the property.

Charles Springer, after consulting many lawyers with a view to posting himself concerning the title of Dawson to the land he claimed, called upon Mr. Jones with the object of employing him to defend the title of John B. Dawson against the Maxwell Land Grant Company in the action of ejectment.

This entire controversy grows out of the contract of employment of Jones by Springer. It was not reduced to writing and rests entirely in parol.

Pursuant to his employment, Jones defended Dawson in the action of ejectment in the district court of San Miguel county, New Mexico. This trial resulted in a judgment in favor of Dawson. The cause was then reviewed by the Supreme Court of New Mexico, and Dawson was again successful. The cause was then removed by writ of error to this court, with the result that the judgment of the supreme court was reversed and the cause was remanded for a new trial.

Maxwell Land Grant Co. vs. Dawson, 151 U. S., 586.

Jones, acting as the attorney for Dawson on the new trial of the cause, again secured a judgment for Dawson. The Maxwell Land Grant Co. then removed the cause again to the Supreme Court of New Mexico, and afterwards dismissed its writ of error there without a trial having been had in that court.

At the time of Jones' employment there were no persons present other than Jones and Springer, and they were the only witnesses who testified in this action to the terms of

the contract under which Jones was employed. They *agreed* that at the time of the employment Jones undertook the defense of the ejectment suit *for five hundred dollars.*

Record, pp. 28 and 40.

They *disagreed* as to the *extent of the services* which Jones undertook to render under his contract of employment.

Jones in his testimony, in giving his version of the contract of employment, asserted

> "that Springer then said, 'Well, we will fix the fee
> " ' at five hundred dollars for the case in the district
> " ' court and in the Supreme Court of the Territory.'
> " and Springer thereupon gave Jones a check for one
> " hundred dollars on account of his fee; that nothing
> " was said about the case in the Supreme Court of the
> " United States or about a second trial or about a
> " second appeal to the Supreme Court of the Ter-
> " ritory."
>
> Record, p. 28.

Springer in giving his version of the contract of employment asserted

> " that he was not personally acquainted with Mr.
> " Jones and was introduced to him on the day when
> " he first spoke to him about the Dawson case and
> " told Mr. Jones something of the case, told him that
> " the Maxwell Land Grant Company had brought a
> " suit in ejectment against Mr. Dawson involving the
> " title to his ranch in Colfax county; that he had an
> " interest in the property and that he had to pay all
> " the expenses of the litigation; that he had come to
> " see if he could employ him; that Jones asked the
> " witness if he had employed or if he expected to
> " employ anybody else; that he told Jones he had no
> " intention of doing so; that he told Jones that the
> " case would undoubtedly be bitterly fought by the
> " Maxwell Land Grant Company and that they had
> " up to that time never been defeated in a lawsuit.
> " that the case would undoubtedly go to the Supreme

"Court of the United States and asked him what he "would charge him to conduct the litigation; and "Jones answered, 'I am willing to leave the matter "'entirely to you; that witness then said, 'I would like "'to have settled what your charges will be and asked "'Jones to state what his charge would be,' to which "Jones replied that he did not care to do that; that "witness said 'How would a fee of *five hundred dol-*"*lars do?*' to which Jones replied, '*That will be per-*"*fectly satisfactory,*' and witness said, '*That is for*"*the entire litigation,*' Mr. Jones after some hesita-"tion said, '*Yes, I am satisfied with that.*'"

Record, pp. 39 and 40.

Jones also testified that he was ignorant of the fact that Charles Springer had an interest in the subject-matter of the litigation, and that had he known it he would not have permitted Springer to fix the amount of his compensation and would not have made the original agreement for the five-hundred-dollar fee.

Record, p. 30.

Springer on his defense testified that he told Jones that he had an interest in the property and that he had to pay all the expenses of the litigation.

Record, pp. 39 and 41.

Jones also testified that in the fall of 1898 he brought up the matter of his compensation with Mr. Springer, and that Springer stated he (Jones) ought to wait until the property was sold and get a big cash fee out of the proceeds.

Record, p. 30.

Springer denied this in the following language:

"That neither at that time or place nor at any "other time or place did I ever say to Jones, 'Wait "'until the property is sold and then receive a big "'cash fee or anything of that substance or effect.'"

Record, p. 41.

This whole controversy hinged on the terms of the contract and the extent of the services which Jones was required to perform under the contract.

If Jones' version of the contract correctly stated its terms, then he had a cause of action against Springer.

If Springer's version of the contract correctly stated its terms, then Jones did not have a cause of action against Springer.

Each of the parties submitted his version of the contract to a jury, with the result that the jury by its verdict found the *"issues in favor of the defendants."*

Record, p. 11.

Points and Authorities.

Plaintiffs in error seek to reverse the judgment pronounced on the verdict of the jury and the affirmance thereof by the Supreme Court of New Mexico, and assign eleven errors in the proceedings which led up to the judgment. These eleven alleged errors may be grouped under two heads:

1. Alleged errors committed by the district court in refusing to withdraw certain evidence from the consideration of the jury.

2. Alleged errors committed by the district court in its instructions to the jury and its refusal to give certain requested instructions.

I.

The first, second, and third assignments of error all relate to the refusal of the district court to withdraw certain evidence from the consideration of the jury introduced by defendants for the purpose of establishing what would be reasonable compensation for the services of Jones in the event

such services were found to have been rendered by Jones pursuant to his version of the contract of employment.

In the trial of this cause two theories were by the evidence presented to the jury: That advanced by plaintiffs, to the effect that the contract of employment *did not* embrace the services of Jones rendered in the trial of this cause subsequent to the first trial of the cause in the district and supreme courts of New Mexico, and that advanced by defendants, to the effect that the contract of employment *did* embrace the services of Jones rendered in the trial of this cause subsequent to the first trial of the cause in the district and supreme courts of New Mexico.

The plaintiffs introduced the testimony of several lawyers, who gave to the jury their opinions as to the value of the services performed by Jones. This evidence only became material *in the event the jury accepted Jones' version of the contract as* truthfully and correctly expressing the terms of his contract, for if his compensation for all the services rendered by him had been fixed by contract, as testified to by Springer, then none of this testimony of the various lawyers was at all material; and the court by its instruction (Record, p. 65) categorically so charged the jury. This instruction is as follows:

> "If the jury believe from the evidence that the defendant Charles Springer made and entered into a contract with plaintiff A. A. Jones, under, which contract it was agreed by the said Jones that he would conduct the defense in the action of the Maxwell Land Grant Company against John B. Dawson through the entire litigation for the sum of five hundred dollars, and that such contract was not afterwards modified or rescinded, then you should not consider the evidence of the various attorneys who have testified to the reasonable value of the services of the said Jones, but should disregard the same for the reason that the contract has limited and fixed the amount to which said Jones is entitled; and if you so find and further believe

> " from the evidence that the said Charles Springer has
> " paid to the said Jones the said sum of five hundred
> " dollars so agreed upon and fixed by said contract,
> " then you should find in favor of the defendants."

And the supreme court of the Territory, in affirming the correctness of the view expressed by the trial judge by the above instruction, said:

> " Whether or not there was a contract limiting
> " Jones to a fee of five hundred dollars was the first
> " question for the jury to determine, and having
> " found that there was such contract all the testimony
> " as to the value of Jones' services and the value of
> " the land involved in the Dawson suit became im-
> " material and not for the consideration of the jury.
> " A ruling as to the admission or rejection of such
> " evidence in the face of the verdict of the jury
> " would not constitute error, regardless of its char-
> " acter."
>
> Record, p. 98.

To rebut the testimony of these various lawyers, the defendants also put in evidence the opinions of various other lawyers who gave their opinions to the jury as to the value of Jones' services, in the event it was found no contract had fixed the compensation for all the services rendered by Jones.

The evidence of these witnesses was elicited by an hypothetical question which is not preserved by the record. The bill of exceptions in this cause omitted the questions asked these witnesses, and it will be presumed that the question contained every element and fact essential to form a basis for the opinion and conclusion expressed by the witnesses.

To properly review the answers of the witnesses, it is necessary that the question to which the answer is a reply should be considered in connection with the answer, because the question is a part and qualification of the answer and its absence precludes a review of the answer.

In giving its assent to this proposition, the Supreme Court of New Mexico said:

> "Counsel in their brief state that the hypothetical "question propounded on behalf of defendants in "error to these witnesses, omitted the element of "value of the property in the Dawson suit. The "transcript has not brought into this court the hypo-"thetical questions propounded in the court below "to these witnesses, and counsel's synopsis of the "testimony-in-chief does not include these questions. "In the absence of the questions which the court has "a right to examine in determining their contents "we must assume that the questions were properly "framed. This objection is urged especially as to "the testimony of Mr. Twitchell, but Mr. Twitchell "testified: 'My entire testimony has been given on "the assumptions provided in the question made to "me by Mr. Spiess.' That there were hypothetical "questions propounded to these witnesses is not ques-"tioned, it is only objected that one element which "counsel for plaintiffs in error deems essential was "omitted. This court cannot assume the correct-"ness of counsel's contention as to this omission, in-"asmuch as the hypothetical questions are not be-"fore the court."
>
> Record, pp. 98-99.

Without reference to the hypothetical question propounded these witnesses, the record as presented by the plaintiffs in error discloses that these witnesses by their answers took into consideration only facts properly in the case and embraced elements which may properly be considered in fixing the value of an attorney's services; but it is objected that *all* of the facts in evidence, or which might be put in evidence and considered in fixing the reasonable value of an attorney's services, were not included in the answer of the witness, and particularly that the *value* of the property in litigation was not taken into consideration by the witnesses, or, if it was so considered, that this element was not disclosed

to the jury. The objection to the omission of this element by the witnesses in expressing their opinion does not go to the *competency* of the evidence, but merely affects the strength or weight of the testimony.

The value of professional services is made up of so many complex and collateral elements that absolute accuracy is unobtainable.

The testimony of these witnesses furnished some evidence which the jury might have considered in arriving at a verdict. If one element which goes to make up the value of an attorney's services was omitted by the witnesses, this infirmity simply affects the weight of the testimony.

That a hypothetical question is not required to embrace all of the facts proven or elements which may be considered upon the particular subject under investigation has been many times expressly ruled by the courts of the United States. Thus, in *Turnbull vs. Richardson,* 69 Mich., 413, the court said:

> "Hypothetical questions may, and often must, in "order to convey any meaning whatever, embrace "facts assumed or proven, which are not, standing "alone, the subject of expert testimony. *Such ques-"tions need not state all the facts in the case.* If the "facts stated are in the case, or afterwards proven, "and they are such as to form the basis of an opin-"ion by an expert, the question is proper, although "it does not contain a statement *of all the facts.* "The value and weight of the answer or opinion will "depend very much upon whether the question con-"tains a full or only partial statement of facts. So, "too, as to being explicit, certain, and containing "fullness of detail; all these considerations are "proper to be addressed to the jury and weighed by "them."

In *Denver & Rio Grande Ry. Co. vs. Roller,* 100 Fed. Rep., 738, 754, the court said:

"In all that we have said, it must be distinctly "understood that we do not deny the general propo- "sition urged by counsel, but here expressly affirm "the same—that it would be reversible error to ad- "mit the answer of expert witnesses to hypothetical "questions which assume the existence of facts upon "which no evidence is offered. But when the ques- "tion assumes the existence of any state of facts "which the evidence directly, fairly and reasonably "tends to establish or justify, and does not transcend "the range of evidence, it is proper to permit such "questions to be answered, and it is not necessary "that the questions shall embrace or cover all the "facts in the case."

In *Davidson vs. State*, 34 N. E., 987-994, the court said:

"The questions to which the appellant urged his "objection did nothing more than call for the opin- "ion of the witnesses upon subjects to which they "were competent, as experts, to testify. As to the "second objection, it would seem to be sufficient "to say that it was not necessary that the hypothet- "ical questions propounded to the witnesses should "embrace all the facts proven upon the particular "subjects under investigation. In the examination "of expert witnesses, counsel may embrace in his "hypothetical question such facts as he may deem "established by the evidence, and if opposing coun- "sel does not think all the facts established are in- "cluded in such questions, he may include them in "the questions propounded on cross-examination. "Any other course would result in endless wrangles "over the question as to what facts were and what "were not established. Citing Goodwin *vs.* State, 96 "Ind. 57; Rogers' Expert Testimony, p. 39; Stearns "*vs.* Field, 90 N. Y., 640."

In *Brooks vs. City*, 87 N. W., 682-83, the court said:

"Many objections are made to hypothetical ques- "tions asked of expert medical witnesses, on the

"ground that they do not embody all the facts as "shown by the record, but it is well settled that a "hypothetical question is not improper simply be- "cause it includes only a part of the facts in the "record."

In *Cole vs. Fall Brook Coal Co.*, 159 N. Y., 59; 53 N. E. Rep., 670, the court said:

"In framing a hypothetical question counsel may "base it upon the truth of all the evidence or upon a "hypothesis specially framed on certain facts assumed "to be proved for the purpose of inquiry. The ques- "tion is not improper simply because it includes only "a part of the facts in evidence."

In *Stearns vs. Field*, 90 N. Y., 640-641, the court said:

"After a discussion of the evidence to show that "the questions were justified, the opinion continues: "'It is now argued by the appellant that the question "'is defective in that it does not state enough. This "'objection was not made at the trial. If, in the "'opinion of the counsel, there was evidence other "'than that supposed proper for the witness to con- "'sider, his attention should have been called to it "'upon cross-examination. Such a question is not "'improper, because it includes only a part of the "'facts in evidence.'"

In *Horn vs. N. J. Steamboat Co.*, 48 N. Y. Supp., 348-51, the court said:

"In framing hypothetical questions to be put to a "witness counsel are required to confine themselves "to facts which are proven, or which the jury might "find, or any facts which might be assumed from the "evidence already in the case, and which are parti- "nent to the theory they are attempting to uphold. "But counsel are not called upon, in framing a hypo- "thetical question, to present all the facts which have "been made to appear. If they keep within the facts "and fair inferences from them, they have done all

"that can be required; and the hypothetical question "thus framed is not objectionable. If the question "omits facts which are material and pertinent to the "inquiry, that is a subject of comment to the jury, "and so far as those facts are omitted, the weight to "be given to the testimony elicited by the question is "impaired; but that does not at all affect the com- "petency, however much it may affect the conclu- "sions the jury are to draw from the answer. An "examination of the question which was objected to "will show that every fact assumed in the question "might have been found by the jury from the evi- "dence which had already been made to appear."

The case of *Morrill vs. Hershfiel*, 47 Pac. Rep., 997-998, is conclusive upon this proposition. That was an action to recover an attorney's fee, and the hypothetical question objected to in that case omitted the element or the fact of the result of the suit. Preliminary to a discussion on the competency of the hypothetical question, the court said:

"* * * The jury awarded the plaintiff eleven "hundred and ninety-four dollars. To the hypo- "thetical question asked the several witnesses who "were called as experts, the appellant objected be- "cause the question propounded did not include one "of the elements entering into a determination of the "reasonableness of the compensation of an attorney, "viz., whether or not the action in which the services "were rendered was decided in favor of the defend- "ant or against him. The court overruled the objec- "tion and permitted the question and answers to be "read to the jury, and it is this alleged error alone "that appellants relied upon.

"The better rule appears to be that in an action "brought by an attorney to recover the reasonable "value of his services in the conduct of a lawsuit, it is "proper that the result of the litigation be laid before "the jury as one of the elements to be considered by "them in arriving at a just valuation to be put upon "his services. Randall *vs.* Packard, 142 N. Y., 47; "Stevens *vs.* Ellsworth, 63 N. W., 683.

"But while it is one of the proper elements for consideration, we cannot say that it is so essential as to require us to conclude that its omission on direct examination was prejudicial to the appellant's rights. We must assume that the appellant had notice of the taking of the deposition and of the interrogatories that were to be propounded to the experts. He, therefore, had an opportunity to cross-examine them and to include the element of the result of the litigation in his cross-examination if he desired to do so. So far as the question propounded to the experts went, it is not complained of, and the rule is when a witness has expressed an opinion based upon the facts assumed by the one whose witness he is, the opposing party may cross-examine him, by taking his opinion based upon any other facts assumed to have been proved by the evidence, provided, of course, that such hypothetical state of facts is fairly within the scope of the evidence adduced on the trial. If the question asked of the witness is defective because it does not state enough, and in the opinion of counsel there was evidence other than that included in the hypothetical question, which he believed it was proper for the witness to consider, the attention of the witness should be called to it upon cross-examination; citing Davidson *vs.* State, 34 N. E., 972; Goodwin *vs.* State, 96 Ind., 550; R. R. Co. *vs.* Compton, 75 Texas, 667; Rogers' Expert Testimony, sec. 27. But the question put him may not be improper because it includes but a part of the fact in evidence; citing Sterns *vs.* Field, 90 N. Y., 640; Mercer *vs.* Voss, 67 N. Y., 56; Thompson on Trials, sec. 625."

In the case at bar, as in the case just quoted, the objection was not taken to the hypothetical question, but the evidence elicited by the question was objected to.

Plaintiffs in error in their brief cite the case of *Raub vs. Carpenter*, 187 U. S., 152, as bearing out their contention that a hypothetical question propounded to an expert must embrace all the facts and elements in evidence concerning and which go to qualify the matter under investigation.

In that case the expert was asked the following question:

> "Doctor, have you formed any opinion from your "uncle's general condition of health and the condi- "tion disclosed by his brain at this investigation *and* "*from all you know about him yourself* what his "condition of mind was?"

The objection offered to this question was to the portion *"and from all you know about him yourself."*

Discussing this objection, the Supreme Court of the United States says:

> "Clearly the opinion of the witness from facts he "did not disclose was inadmissible. If he knew any- "thing about the deceased other than what he stated, "which aided him in arriving at a conclusion, that "knowledge should have been developed.
>
> "In that particular the question assumed the *ex-* "*istence of facts for which there was no foundation in* "*the evidence.*"

This case in no wise can be construed as authority against the proposition for which we have been contending. Our contention, which is overwhelmingly supported by the authorities, is that a hypothetical question, or the answer thereto, is competent if it is *based upon facts in evidence in the case,* although all of the facts in evidence are not considered either by the question or answer. The answer of the witnesses Twitchell, Veeder, and Leahey all have for their foundation *facts in evidence in the cause,* whatever construction may be put on their answers. No part of their answers is based upon *facts not in evidence,* as was the case of the question held improper in *Raub vs. Carpenter, supra.* Moreover, in that case this court impliedly holds that a question need not contain all the facts which may be considered in expressing an opinion upon the subject under investigation, for it there says:

> "The question as framed could not properly have "been allowed to be propounded, though caveators

"were left free to put it with the objectionable words "omitted."

From the above authorities it may be deduced that a hypothetical question must be based on the evidence in the cause; that all the facts necessary in arriving at a conclusion need not be embraced in the question; that if some fact or element is omitted, that then it devolves upon the opposite party to take the opinion of the witness on the matter with the omitted fact or element included on cross-examination, or he may comment on the frailty of the opinion expressed in answer to a question which omits an element necessary to a correct conclusion in addressing the jury.

Now, testing the answers of the witnesses which plaintiffs in error sought to have withdrawn from the jury by the above rule, we find that the evidence of the witness Veeder, whose testimony plaintiffs sought to have withdrawn from the jury, was all based on evidence and facts in the case, and, moreover, on the testimony of Jones himself (Record, p. 45); that the evidence of the witness Leahy was likewise all based on evidence and facts in the case, and so, too, the evidence of the witness Twitchell was all based on evidence and facts in the case.

The authorities are quite uniform to the effect that if an element or fact is not considered by the witness in giving his opinion, that then the weight to be given to the testimony elicited by the question is impaired; but that it does not at all affect its competency, and that if opposing counsel does not think all the facts established are included in such questions he may include them in the questions propounded on cross-examination.

No attempt was made by plaintiffs' attorney to take the opinion of the witnesses Veeder, Leahy, and Twitchell on the question of the value of Jones' services, on the hypothesis that the land in litigation was of the value of $400,000, the value fixed by their witnesses; but, on the contrary, in cross-examining the witness Leahy the attorney who examined

him expressly forbade him stating what value he fixed on the land in litigation, as will be seen by reference to the following:

> "JEREMIAH LEAHY, a witness on behalf of the de-
> "fendants, was sworn and examined * * *. Upon
> "cross-examination the witness was interrogated as
> "follows:
> "Q. In estimating the value of Mr. Jones' services
> "in that case have you made any mental assumption
> "as to the value of the property involved?
> "A. I have—in this way.
> "Q. I do not ask you what it is. I ask you if you
> "have.
> "A. Yes, sir.
> "Q. And your estimate of the value of Mr. Jones'
> "services is based on the valuation of that property
> "which you have fixed in your own mind?
> "A. Yes, sir, from——.
> "Q. Never mind from what. It is based on the
> "valuation which you fixed on the property in your
> "own mind.
> "A. No, sir, not entirely so."
>
> Record, p. 53.

Plaintiffs in error cite a large number of authorities to the effect that where there is a dispute as to the terms of an alleged contract evidence of the value of the subject-matter of the contract is admissible as tending to show that such a contract was or was not probably entered into.

We concede the correctness of this proposition.

In the trial of this cause there was no attempt made by the trial court to deprive plaintiffs from making such proof. Indeed, some three or four witnesses testified that Jones' services were worth from seventy-five to one hundred twenty-five thousand dollars, and the jury had that evidence before it when it reached the conclusion that all of Jones' services had been provided for by the contract.

In all the cases cited above, wherein it was held that evidence is competent which has been elicited by a question which does not take into consideration all of the elements which go to make up the value of a given thing, attempts were made to prove value, or the condition of things, and it was held that the omission of some one of such elements only went to the weight of the testimony and did not affect its competency.

But, even if the court did commit error in refusing to withdraw from the consideration of the jury the evidence expressed in the opinions of the witnesses Veeder, Leahy, and Twitchell, it was error without prejudice, because the jury by its verdict found that the plaintiff had no cause of action.

The testimony of the experts was put in evidence only for the purpose of aiding the jury in arriving at and fixing the value of Mr. Jones' services, in the event that his theory of the case was adopted by them, and had no application whatever to the theory of the defendant. The jury by its verdict adopted the defendant's theory and discarded the plaintiffs' theory.

If an erroneous rule was given, or if erroneous evidence was admitted for fixing the value of Mr. Jones' services, and the jury found that he had no cause of action at all, it is obvious that it did not apply the erroneous rule or the erroneous evidence in measuring the value of the services.

In *Consolidated Coal Co. vs. Maehl*, 22 N. E. Rep., the court said at page 716:

> "The engineer testified that he had run the engine
> "connected with the hoisting apparatus at this mine
> "for two months prior to the injury of Maehl, and,
> "over appellant's objection, was permitted to testify
> "to his want of experience and competency at the
> "time of his employment and to what proficiency he
> "had attained as an engineer at that time. This, it
> "is insisted, was error and tended to the prejudice
> "of appellant. We think that in so far as it tended

"to show his capacity at the time of the accident it "was clearly competent. It was for the jury to say, "if they found that the injury resulted through the "fault or negligence of the engineer, whether he was "a competent, experienced and sober engineer, such "as appellant was required to place in charge of its "engine, used in lowering into or hoisting persons "from the mine. His previous training and experi- "ence, or want of it, would furnish one means by "which a conclusion might be reached. But aside "from this, the jury, by their second special finding "expressly found that Machl's death was not caused "by the negligence of the engineer, and it cannot be "seen that this evidence, *if improper*, could have "prejudiced appellant."

In *Manning vs. Bresnahan*, 63 Mich., 584-587, the court said:

"We do not discover any error in the instructions; "and the jury, having found a verdict for the de- "fendant, must have found that the sale to plaintiff "was fraudulent as to the plaintiffs in the attach- "ment suit. This being so, the first point taken by "plaintiff becomes unimportant. This relates to the "exclusion of testimony tending to show a loss of "profit by reason of the attachment. The testimony "excluded did not go to the right of plaintiff to re- "cover, but to the extent of her recovery; and the "jury having found that she had no cause of action, "if the testimony was erroneously excluded, it was "error without prejudice."

In the case at bar the evidence of the expert witnesses objected to by plaintiffs' counsel did not go to the right of the recovery by Jones, but to the extent of his recovery. The jury found he had no right of recovery at all; consequently they did not consider the extent of this recovery.

And in *Alexander vs. Town of Oshkosh*, 33 Wis., 277-280, the court said:

"An exception was taken to the ruling of the court "below in not allowing the plaintiff to prove the loss

" of his business in consequence of the injury he had " received, and what that business was worth per " annum. It is said that this evidence was proper " to show the amount of damages the plaintiff had " sustained. Concede that this view is correct and " yet it is obvious that the error becomes wholly im- " material when we consider the result arrived at by " the jury. For the jury found no cause of action, " and that the plaintiff was not entitled to recover any " damages. So this ruling, even if erroneous, could " not have worked any injury to the plaintiff in view " of the verdict."

Baumgardner vs. Willett, 66 Pac., 1001.
A. T. & S. F. R. R. vs. Sly, 21 Pac., 790.
Yaeger vs. S. P. Ry., 51 Pac., 190.
K. C., etc., R. R. vs. Chamberlain, 60 Pac., 15.
Kendall vs. Davenport, 65 Pac., 688.
Fowler vs. Phœnix, etc., 57 Pac., 421.
Thompson vs. Schuster, 28 N. W., 858.
Knapp vs. Sioux Falls Nat. Bank, 40 N. W., 587.
Parrot vs. Swain, 29 Ill. App., 266.
Burnett vs. Luttrell, 52 Ill. App., 19.
Caruthers vs. Murray, 75 Ia., 173.
Norton vs. Foster, 12 Kan., 44.
Moody vs. Camden, 61 Me., 264.
Pollan vs. Brownell, 131 Mass., 138.
Parsons vs. Sutton, 39 N. Y. Supp., 544.
Read vs. Bichols, 118 N. Y., 224.
Nonis vs. Northhouse, 46 Vt., 587.
Fulham vs. Howe, 60 Vt., 351.
Schrubbe vs. Connell, 69 Wis., 476.

Plaintiffs in error by their fourth assignment of error complain of the action of the trial court in refusing to withdraw so much of the testimony of R. E. Twitchell as related to the value of coal lands in New Mexico.

The witness Twitchell, testifying upon cross-examination in response to questions propounded to him by plaintiffs, stated:

> "My understanding of fair market value of prop-
> " erty is what it will bring at forced sale after fair
> " and reasonable publication in the centers where
> " money can be had to purchase."

He was then asked:

> " Q. Your estimate of the value of Mr. Jones'
> " services is based upon your opinion as to what this
> " property would have brought at forced sale in
> " centers where money could have been had to pur-
> " chase it?"

He answered:

> " A. No, sir, it is based upon the services rendered
> " by Mr. Jones in the prosecution of this suit."
> Record, p. 45.

This evidence was brought out on cross-examination by the plaintiffs, and if it injured them they have only themselves to blame for it.

It was by their act and not by defendants put in evidence. However, if there was any error in permitting his testimony upon that point to remain with the jury, it was harmless, in view of the jury's finding, as has been heretofore pointed out.

II.

The other assignments, viz., five, six, seven, eight, nine, and ten, all relate to the instructions given and refused by the trial court. These assignments will be discussed *seriatim*.

A.

The refusal of the Court to give the following instruction is assigned as error:

> "If the jury believe from the evidence that the "plaintiff, A. A. Jones, agreed with the defendant, "Charles Springer, to defend the case of the Max- "well Land Grant Company *vs.* John B. Dawson, "for a fee of five hundred dollars; and that there- "after and before the rendition of all the services "agreed to be rendered by said Jones in said cause "the said Springer said to the said Jones, 'You can- "'not be expected to attend to this business for any "'five hundred dollars; go on with the case, and we "'will see how we come out, and after it is all over, "'you will be paid what is right,' or words to that "effect, and such proposition was accepted and acted "on by said Jones, then the plaintiffs in this case "are entitled to recover for the services of said Jones "in said case whatever the same may be reasonably "worth, as shown by the evidence in this case."

We confidently submit that the jury were substantially instructed by the court upon the law applicable to all matters and things contained in the above requested instruction in its instructions numbered 4, 5, and 8, viz:

4.

> "Plaintiffs admit that there was a contract made at "the time of Mr. Jones' employment in said case fix- "ing the amount of his compensation at five hundred

"dollars for the trial of the cause in the District "Court and Supreme Court of the Territory, and that "three hundred dollars was paid to plaintiff, Jones, "under said contract, but they deny that said con- "tract covered any services of Jones in the Supreme "Court of the United States, or when said cause "came back for trial to the District Court and Su- "preme Court of this Territory for the second trial."

5.

"Plaintiffs' claim, however, that the original con- "tract in relation to the services of A. A. Jones was "modified by a subsequent agreement made with the "defendant, Charles Springer, to the effect that his "compensation was not to be limited to the five hun- "dred dollars originally fixed, but that he should go "on with the litigation, see how it came out, and "then Charles Springer would do what was right, "and after the property should be sold he would pay "said Jones a big cash fee."

8.

"If the jury believe from the evidence that the "original contract in relation to Mr. Jones' compen- "sation was afterwards modified so that such com- "pensation was not to be limited to the $500.00 "agreed upon, then you should find for the plain- "tiffs in such sum as you believe from the evidence "to be the reasonable value of the services of Jones, "less whatever sum may have been paid thereon."

The fifth instruction of the court, read in connection with the eighth, completely covers everything contained in the requested instruction.

In stating the theory of the plaintiffs' case that the original contract had been modified, the court in its instruction used the language, that Springer "after the litigation was ended *would do what was right.*" The requested instruction used the language, "After it is all over you will be *paid* what is right."

When it is considered that Springer had no other act to perform but to *pay*, it will readily be seen that there would

be no substantial difference between "*doing* what was right" and "*paying* what was right."

But the court by no rule of law was required to give a categorical instruction based on the plaintiffs' theory of the case, and embody in such instruction the evidence or facts which they assumed modified the contract. The jury had all the facts before it. It had before it Jones' testimony, wherein he claimed that the original contract had been modified, and they were by the court instructed in its eighth instruction fully as to their duty in the event they found from the evidence that the original contract had been modified.

The court had a right to assume that the jury remembered the evidence upon which a modification of the contract was claimed, and was not required to set out such evidence in its instructions.

The judge in charging the jury may exercise his discretion as to the form in which he expounds the law and comments on the case. It is a rule of universal application that the court is not bound to instruct the jury in the exact language of the request, but may instruct in such terms and such a manner as shall comport with the real merits of the case.

The plaintiffs desired a direction to the jury, as to their duty in the event it was found that there was a modification of the original contract. The court by its eighth instruction discharged its full duty in that regard.

Continental Improvement Co. vs. Stead, 95 U. S., 165.
Boyce vs. California Stage Co., 25 Calif., 960.
Birmingham Fire Ins. Co. vs. Pulveri, 126 Ill., 329.
White vs. Gregory, 126 Ind., 95.
Larsh vs. Des Moines, 74 Iowa, 512.
Missouri Pacific R. R. Co. vs. Cassity, 44 Kan., 207.
Naples vs. Raymond, 72 Me., 213.
Kersner vs. Kersham, 36 Md., 334.
Champlain vs. Detroit Lumpling Co., 68 Mich., 238.
Norwood vs. Sommerville, 159 Mass., 105.
Law vs. Grimes Dry Goods Co., 38 Neb., 215.
Ayers vs. Watson 137 U. S., 584.

B.

The action of the court in refusing to give the following instruction is assigned as error:

> "The court instructs the jury that the credibility "of the witnesses is a question exclusively for the "jury; and the law is, that where two witnesses testify "directly opposite to each other, the jury are not "bound to regard the weight of the evidence as evenly "balanced. The jury have a right to determine from "the appearance of the witnesses on the stand, their "manner of testifying, their apparent candor and "fairness; their apparent intelligence or lack of intel- "ligence and from all of the other surrounding cir- "cumstances appearing on the trial, which witness is "the more worthy of credit and to give credit accord- "ingly."

This requested instruction is fully covered by instructions numbered 14 and 15 as the same appear on pages 65 and 66 of the printed record.

The requested instruction was merely advisory, or, as it is sometimes termed, a "*cautionary*" instruction touching the credibility of witnesses. The refusal to give this instruction would not have been error, even though it had not been fully covered by the instructions given.

Kelley vs. Schupp, 60 Wis., 76-86.

C.

The action of the court in giving instruction number 13, appearing at page 65 of the printed record, and the proceedings of the court in modifying the same are assigned as error. (See seventh, eighth, ninth, and tenth assignments of error.)

The record discloses (Record, p. 69) that after all the arguments had been concluded by counsel for the defendants, and before the closing argument for plaintiffs had been made, the court modified its instruction numbered 13 by striking out the word "*fact*" and inserting in lieu thereof the word "*issue;*" that the modification was reduced to writing (see Record, p. 69) and read to the jury from a carbon copy of the original charge; that after the verdict of the jury had been returned the court stenographer made the same modification on the original charge.

There was no objection made to the method employed by the judge in making this modification, and it was not suggested by any one that another course should be pursued. Counsel for plaintiffs expressed no dissatisfaction with the proceedings, but seemed to be eminently satisfied therewith, the principal counsel for the plaintiffs, Mr. Field, exclaiming, "As thus modified, I think the charge is absolutely without objection, if the court please." (See Record, p. 69.)

While sub-section 119 of section 2685, Compiled Laws of New Mexico, 1897, has dispensed with the necessity of objecting and excepting to the giving of or refusal to give instructions in order to secure a review of the same, it is necessary to make seasonable objection to such proceedings as were had in the modification of instruction number 13 in order to secure a review thereof. There is no code provision or practice act of New Mexico which relieves parties from objecting to such proceedings if they desire a review of them.

In *Neher vs. Armijo*, 66 Pac., 518-519, the Supreme Court of New Mexico said:

> "It is fundamental that errors complained of must "be objected to and exceptions saved, or they will "be disregarded in an appellate court * * * In "so holding we are not unmindful of sub-section 119, "section 2685, Com. Laws, 1897, which dispenses "with formal exception, but in no sense dispenses "with objection in order to preserve the error com- "plained of. We simply hold that objection must "be preserved according to the forms of law to be "available in this court."

And on pages 519-520 that court further says, in discussing the necessity for objection under section 897, C. L., 1897, of New Mexico:

> "Can it be pretended that immaterial, invited or "waived errors are to be passed upon? We think "not. An error of the trial court ceases to be such in "the appellate court if the same is immaterial, in- "vited or waived. We are confirmed in this conclu- "sion by the persistent ruling of this court ever since "this statute was passed in 1889, to the effect that "only such errors as are properly saved and repre- "sented will be considered."

See also *Chaves vs. Meyers*, 68 Pac., 917, and *Jung vs. Myers*, 68 Pac., 933.

Section 85 of the Code of Civil Procedure declares that the court shall disregard all errors, defects, or imperfections occurring at any stage of the trial, which do not affect the substantial rights of the parties.

This is in accord with and exemplifies the policy of the legislature in enacting the remedial provisions of the code requiring a disregard of unsubstantial and uninjurious irregularities.

These assignments of error based on the proceedings mentioned are hypercritical in the extreme.

It is not pointed out how plaintiffs were in the least prejudiced thereby, and it cannot be conceived how they could have been prejudiced by the course pursued by the court.

While the word "*fact*" was stricken out and the word "*issue*" inserted in lieu of it, there was no substantial change effected in the instruction. The term every "issue" necessarily means the same as every "fact." The court instructed the jury that the burden of proof as to every material fact was upon the plaintiff, except that of payment, as to which fact the burden was upon the defendants. The "issue" of payment is a fact. Using the word "fact" instead of "issue" did not impose on the plaintiffs any additional duties or relieve the defendants of any duties, or in anywise change the *quantum* of proof either side was required to produce.

The term "*issue*" is broader and may include more than the term "*fact,*" and an issue may embrace many facts; but many facts in that case would be coextensive with the "issue" they, when taken together, make up. If, then, the court directed the jury that the plaintiffs must prove by a preponderance of the evidence every fact except payment, it was tantamount to directing them that they must prove every issue except payment. In requiring plaintiffs to prove by a preponderance of evidence all the facts in the case except payment, they were then necessarily required to prove all the issues except the issue of payment.

The record in this case fails to show whether the jury took any instructions whatever to their jury-room, and, in the absence of such a showing, this court will presume that the proceedings of the court in that regard were regular; but if it affirmatively appeared that no instructions were taken to the jury-room by the jury, error upon that account could not be assigned, because the record does not show a request from plaintiffs to have the instructions sent to the

jury-room, or an objection by plaintiffs to their not being or having been so sent.

Sub-section 128 of section 2685, C. L. New Mexico, 1897, which provides that the instructions "shall be carried by the "jury to their room for their guidance to a correct verdict, "according to the law and the evidence," is a provision transported in the exact language from the State of Missouri.

Section 2188, Revised Statutes of Missouri, 1889, is as follows:

> "When the evidence is concluded, and before the "case is argued or submitted to the jury or to the "court sitting as a jury, either party may move the "court to give instructions on any point of law aris- "ing in the cause, which shall be in writing and "shall be given or refused. The court may on its "own motion give like instructions, and such in- "structions as shall be given by the court on its own "motion or the motion of counsel shall be carried by "the jury to their room for their guidance to a cor- "rect verdict according to the law and the evidence; "which instruction shall be returned by the jury "into court at the conclusion of the deliberations of "such jury and filed by the clerk and kept as a part "of the record in such case."

When the legislature of New Mexico adopted this provision from Missouri they adopted it together with the construction placed thereon by the courts of that state.

In the case of *Grove vs. City of Kansas*, 75 Mo., 672-677, the Supreme Court of Missouri, construing the provisions of section 2188, *supra*, held that where no objection is raised on account of the failure of the jury to take the instructions with them, there is no ground for a new trial.

D.

The burden of proving the contract as Jones asserted it to be was rightfully imposed on plaintiffs in error.

The objection, however, urged by the plaintiffs, that the court by its 13th instruction erroneously directed the jury as to the burden of proof, and imposed upon the plaintiffs the duty of proving facts and issues by a preponderance of the evidence which the law imposed upon the defendants, would, if the objection were sound, substantially affect the rights of the plaintiffs.

An examination and analysis of the pleadings and the issues raised by them and the evidence introduced to prove these issues will demonstrate the correctness of this instruction.

This instruction is objected to as an erroneous exposition of the law, on the ground that the burden was on the defendants to prove that a contract existed between the plaintiff Jones and the defendant Charles Springer, under the terms of which Jones was employed to attend to the entire litigation growing out of the suit of the Maxwell Land Grant Company *vs.* Dawson.

Ordinarily, the pleadings in a cause are controlling upon the question of burden of proof, as that term was used in the instruction complained of.

The complaint in this case alleges that the defendants employed the plaintiff Jones to render services for them, and agreed to pay the said Jones the reasonable value of his services, and that the reasonable value of such services is $75,000.

The answer of the defendants as to that allegation was a general denial. Under the ordinary rules, there can be no question upon whom the burden of proving his case rests, if the pleadings in the case are to control that question.

Under the general issue, or a general denial, the plaintiff has the burden of proving his claim; and in case the defendant denies merely, or answers so as not to admit, the plaintiff has the burden throughout the trial as to every part of the case.

Selma, etc., Ry. Co. vs. U. S., 139 U. S., 560.
Heineman vs. Hurd, 62 N. Y., 456.
Murphy vs. Harris, 77 Cal., 104.

The general rule is that the one who makes a claim which is denied has the burden of establishing the claim.

McEvoy vs. Swayze, 34 Neb., 315.

And in fixing the burden of proof a pleading or evidence that amounts to a denial has the effect of a denial although cast in the form of an assertion.

Union Nat'l Bank vs. Baldenwick, 45 Ill., 375.
Burnham vs. Noyes, 125 Mass., 85.
Berringer vs. Lake, S. I. Co., 41 Mich., 305.
Eastman vs. Gould, 63 N. H., 89.

Courts have, in determining the question upon what side the burden of proof rests, invented various tests—thus:

One common test to determine upon which party lies the burden is to ask which would be entitled to a verdict if no evidence were offered on either side.

Scott vs. Wood, 81 Cal., 398.
Welterall vs. Hollister, 73 Conn., 622.
Veiths vs. Hagge, 8 Iowa, 163.
McKenzie vs. Oregon Imp. Co., 31 Pac. Rep., 748.

Another test is to consider which party would fail if the allegation in question were stricken from the pleading.

Porter vs. Still, 63 Miss., 357.

Applying these various tests, it follows that a defendant who simply denies should never have the burden of proof.

Truner vs. Wells, 64 N. J. Law, 269.
Sears vs. Daly, 73 Pac., 5.
Benton vs. Burbank, 54 N. H., 583.

And if the evidence or pleading amounts to a denial, although either may take the form of an allegation, the rule is the same.

Cook vs. Malone, 128 Ala., 662.
East vs. Crow, 70 Ill., 91.
Denver Fire Brick Co. vs. Platt, 11 Colo., 509.
Coffin vs. President, etc., 136 N. Y., 655.
Perley vs. Perley, 144 Mass., 104.

The fact that defendants also by their answer plead payment in no wise changes the rule. Payment when plead to a cause of action is new matter, but its presence in the answer could not neutralize or destroy the issue raised by the general denial. The general denial, coupled with the plea of payment, is simply an assertion by defendant to the effect that *I deny that by reason of my employment of you I owe you seventy-five thousand dollars, and what I did owe you by reason of my employment of you I have paid.*

Mr. Pomeroy, at section 724, Code Remedies, says:

> "When a denial is pleaded in connection with a "defense of new matter, the admission in the one "can never be used to destroy the effect of the other. "The concessions of a defense by way of confession "and avoidance do not obviate the necessity of prov- "ing the averments contradicted by the denial. This "rule is universal."

There is much more reason for the rule when applied to pleadings such as were employed in this cause. Here the new matter, namely, the plea of "*payment*," was an allegation which could only refer to the defendant "Springer's"

version of the contract. It was in no sense a plea of confession and avoidance.

It is contended, however, that the question upon whom the burden of proof rests is not controlled in this case by the pleadings, but is controlled by the evidence which was adduced at the trial. That evidence discloses the following state of facts:

Mr. Jones testified as a witness in his own behalf, for the purpose of establishing the allegations of his complaint, to the following facts:

> "That on the tenth day of October, 1891, he was "engaged in the practice of law at Las Vegas, in the "Territory of New Mexico, and had been so engaged "since the fourteenth day of May, 1888, on which "day he was first admitted to the bar and on the last "day mentioned, the defendant, Charles Springer, "came to his office and told him that the Maxwell "Land Grant Company was going to bring, or had "brought a suit against John B. Dawson for his "ranch in Colfax county, and wanted him to repre-"sent Mr. Dawson in that litigation; that Jones ac-"quiesced, and thereupon Springer wanted to know "what fee would be charged and Jones said, 'I do "'not know what would be a right fee. I do not "'know anything about the case or how much work "'would be required, or the value of the property "'involved,' and said to Springer, 'You know more "'about that than I do. Whatever you think is "'right will be satisfactory to me.' Thereupon "Springer asked Jones if five hundred dollars would "be about right, and Jones replied, 'If you think "'that's fair, it will be satisfactory to me;' * * * "that Springer then said, 'Well, we will fix the fee at "'five hundred dollars for the case in the District "'Court and in the Supreme Court of the Territory,' "and Springer thereupon gave Jones a check for one "hundred dollars on account of his fee; that nothing "was said about the case in the Supreme Court of the "United States or about a second trial or about a sec-"ond appeal to the Supreme Court of the Territory;

"* * * that the legal questions involved in the "ejectment suit were difficult and novel and that he "expended a vast amount of labor in the preparation "and trial of the case; that after the first trial, the "defendant, Charles Springer, came to him and said: "'Of course, you cannot be expected to attend to this "'business for any five hundred dollars. You go "'ahead with it; we will see how we will come out, "'and when it is all over you will be paid what is "'right;' that Jones assented to this and went on "with the case with that understanding."

Record, pp. 28, 29.

This is all of the evidence of the plaintiffs which goes to the establishing of the terms under which the plaintiff Jones accepted his employment from the defendant Charles Springer.

Under the general denial, the defendant Charles Springer put in evidence on the part of the defendants all of the testimony bearing upon the employment of Jones by him, viz:

"After the suit was brought, witness visited Las "Vegas to employ counsel and determined to employ "A. A. Jones if he could do so; that he was not per- "sonally acquainted with Mr. Jones and was intro- "duced to him on the day when he first spoke to "him about the Dawson case and told Mr. Jones "something of the case; told him that the Maxwell "Land Grant Company had brought a suit in eject- "ment against Mr. Dawson involving the title to his "ranch in Colfax county; that he had to pay all the "expenses of the litigation; that he had come to see if "he could employ him; that Jones asked the witness "if he had employed or if he expected to employ any- "body else; the witness told him he had not and "had no intention of doing so; that he told Jones "that the case would undoubtedly be bitterly fought "by the Maxwell Land Grant Company and that "they had, up to that time, never been defeated in "a lawsuit; that the case would undoubtedly go to "the Supreme Court of the United States and asked

"him what he would charge the witness to conduct "the litigation and Jones answered, 'I am willing to "leave the matter entirely with you;' that witness "then said, 'I would like to have settled what your "charges will be' and asked Jones to state what his "charges would be, to which Jones replied that he "did not care to do that; that the witness said, 'How "would a fee of five hundred dollars do?' to which "Jones replied, 'That will be perfectly satisfactory;' "and the witness said, 'That is for the entire litiga-"tion?' Mr. Jones, after some hesitation, said, 'Yes. "I am satisfied with that;' that witness told Jones "that he had considerable other business, some of "his own and some that he controlled, which would "require the services of an attorney and that if he "undertook the Dawson case, witness would give "him such business as he had in that line and get "whatever business for him that witness could get "on the outside; witness said also that he would "himself assist in the case in every way possible and "would get up all maps and plats and surveys and "generally hunt up all the evidence in the case; that "Jones made no inquiry with reference to the au-"thority of witness to employ him in the case and "all that was said on that subject was that witness "had an interest in the property and had to pay the "expenses of the litigation. * * * That the "witness never said to Jones, at the time and "place said by Jones, or any other time, that he, "Jones, could not be expected to carry on the "case for a fee of five hundred dollars or to go "on with the case and we will see how we "come out and when it is all over you shall "be paid what is right; that there was not dur-"ing the trial or at any other time any agree-"ment or proposition to make any change in the "compensation or mode of compensation which "Jones was to receive for his services as attorney for "the defendant in that case; that there was never "any change made in the agreement as to compen-"sation of Mr. Jones in that case prior to the final "determination of it, and Mr. Jones never intimated "to witness that he was dissatisfied on account of

"his compensation; that witness paid to Jones seven "hundred dollars and to an attorney in Washington "one hundred dollars, and that two hundred of the "seven hundred, Jones claimed he should have for "expenses to Washington; * * * the other five "hundred dollars was paid as his fee in that case "under the contract."

Record, pp. 39–40, 41.

An analysis of this testimony discloses that the plaintiff Jones by the evidence affirmed that he was employed to attend to the litigation in the case of The Maxwell Land Grant Co. *vs.* John B. Dawson for the sum of $500, which was to be in payment for his services rendered in the trial of that case in the District Court of San Miguel County and in the Supreme Court of the Territory of New Mexico, and that his contract with the defendant Charles Springer did not embrace or extend to the services he performed in the trial of the case in the Supreme Court of the United States, nor at the second trial of the case in the District Court of San Miguel County or in the Supreme Court of the Territory of New Mexico.

The plaintiff Jones affirmed all of these facts. The defendants affirmed nothing whatever. They agreed with the plaintiff Jones that a contract existed between the plaintiff Jones and the defendant Springer; that the plaintiff Jones had been employed under the terms of an express contract to attend to certain litigation for the sum of $500. They denied, however, that the employment only covered the services to be performed by Jones in the District Court of San Miguel County and the Supreme Court of the Territory of New Mexico. They denied the testimony of Jones, which was to the effect that his employment did not include compensation for his services rendered in the Supreme Court of the United States, or at the second trial of that cause in the District Court of San Miguel County and in the Supreme Court of the Territory of New Mexico. Defendants at no

time affirmed anything; neither have they at any time asserted any fact as to which evidence had not already been introduced by the plaintiff. Their entire testimony consisted of a denial of the cause of action of the plaintiff Jones.

Further analyzing this testimony, let us see of what the cause of action of the plaintiff Jones consisted: Mr. Jones claims that he was employed by the defendant Springer to attend to the litigation in the case of The Maxwell Land Grant Company *vs.* Dawson in the Supreme Court of the United States and in the District Court of San Miguel County and in the Supreme Court of the Territory of New Mexico upon the second trial of that cause in those courts, and that that employment was not embraced in the contract which he and Mr. Springer had made by which his compensation was fixed at $500.

Plainly, if the plaintiff Jones had a cause of action against the defendants, it did not grow out of the express contract, because, according to his testimony and the testimony of Springer, the services rendered under that contract were paid for. His cause of action, then, grew out of subsequent alleged employment, the services rendered by him in the Supreme Court of the United States and in the District Court of San Miguel County and the Supreme Court of the Territory of New Mexico on the second trial of that case.

This defendants denied. They admitted no part of it. They sought to defeat the cause of action on the part of the plaintiff by controverting it and denying it *in toto.* They did not admit it and then seek to avoid it by showing affirmative facts which had accrued subsequent to the facts testified to by the plaintiffs. They have affirmed nothing, but have denied generally the testimony of the plaintiffs which gave the plaintiffs a cause of action against them.

The fact that the plaintiff Jones did not give any evidence in rebuttal of the testimony of the defendant Springer upon the issue between them relative to the employment of Jones is significant. If the burden shifted to Springer, it could

only have been by reason of the fact that he put in evidence new matter which was not testified to by plaintiff Jones. If new matter had been introduced in this case by the defendants, it would have been incumbent upon plaintiff Jones to refute this by testimony. The plaintiff Jones, however, was not called upon by the testimony to rebut what the defendant Springer had testified to; and had he taken the stand for the purpose of rebutting the testimony of defendant Springer, it could only have amounted to a reiteration by him of the same facts which he gave in evidence upon the trial in his examination-in-chief. This fact clearly demonstrates that the effect of the testimony of the defendant Springer was only a general denial of the evidence of the plaintiffs and was not new matter.

And so, too, the suggestion that the express contract was modified after it had been made is an assertion of Jones. This assertion originated with him and he initiated proof thereon. Springer simply *denied this assertion, admitted no part of it,* nor did he avoid it by new matter.

Should the plaintiffs, however, contend that the defendants relied upon a different contract from the one put in evidence by plaintiff Jones, they are still in the same dilemma. Under a general denial, the defendant may show that the contract between him and the plaintiff was a different one from that set out in the complaint.

In discussing this proposition in the case of *Wilkerson vs. Farnham,* 82 Mo., 672-679, the Supreme Court of Missouri said:

> "Under a general denial the defending party is "always at liberty to disprove and overthrow the con- "tract asserted against him by proving that it was "materially different from the one so asserted."
>
> *National Cash Register vs. Riggs,* 50 N. Y. Supp., 35.

In *Young vs. Jones,* 8 Iowa, 219, the Supreme Court of Iowa said:

"The defendant is allowed to show in any manner "that the contract alleged was not the agreement by "the parties and this cannot be done more effectively "than to prove an entirely different contract and "promise of the defendant."

Under a general denial, the defendant may always show what the contract really was.

Marsh vs. Dodge, 66 N. Y., 533.
McGill vs. Hall, 26 S. W., 132.

And so, in an action on an *implied* contract for services rendered, the defendant may show under a general denial that there was an express contract for the same services, *and even though such express contract be unlawful and invalid.*

Stewart vs. Thayer, 170 Mass., 560.

See also—

Paris vs. Strong, 51 Ind., 339.
Chicago, etc., Ry. vs. West, 37 Ind., 215.
Wheeler vs. Billings, 38 N. Y., 263.
Marsh vs. Dodge, 66 N. Y., 533.
Goddard vs. Fulton, 21 Cal., 430.
Wilkerson vs. Farnham, 82 Mo., 672.

The evidence given by the defendants as to the extent of the express contract did not tender a new issue, but simply met and controverted the issue affirmed by the plaintiffs.

The evidence of the plaintiffs in this case was to the effect that for part of his services he was to be paid $500, and for the remainder of his services he was to be paid what they were reasonably worth.

The defendants contend that the services were to be paid for as their value was fixed by the express contract. The plaintiff affirms that $500 and the additional sum of $75,000 was the value of his services and what the defendants owed him. The defendants denied this, and insisted

that the sum of $500 fixed the value of the entire services of the plaintiff Jones.

The gist of the action is: How much did the defendants promise to pay Jones for his services? The plaintiff Jones affirms that the defendant promised him $500, which had been paid, and the additional sum of $75,000, and that consequently the defendants owed him the sum of $75,000. The defendant Springer insists by his evidence that he only promised to pay the plaintiff Jones $500 for those services, and denies that he had promised the additional sum of $75,000.

If the plaintiff had sued the defendant upon a contract, and alleged that for certain services he had performed the defendant owed him one hundred horses, and the defendant's answer was a general denial, could he not, in order to disprove the issue of plaintiff, show that he was to have paid two horses for the services to be performed by plaintiff instead of one hundred? Would not this controvert the plaintiff's issue and in effect be only a denial of the issue he tendered? And, if this is so, would it not be incumbent upon the plaintiff to prove his issue by a preponderance of the evidence? The plaintiff affirms that one hundred horses were to be paid. He holds the affirmative of this issue. The defendant denies this, and to disprove this issue insists that only two horses, instead of one hundred horses, were to be paid to plaintiff. This is a fact inconsistent with the truth of plaintiff's issue. Can it be said that the burden is also upon the defendant to prove that only two horses instead of one hundred horses were to be paid to the plaintiff, and that he must prove this by a preponderance of the evidence? If so, *then the anomaly is presented that the plaintiff must prove the issue he has affirmed by a preponderance of evidence, and the defendant must disprove the same issue by a preponderance of the evidence.*

In this cause there was nothing before the court but the one contract of employment. Plaintiff Jones introduced this

contract before the jury, and his cause of action, if any he had, against Springer depended entirely on the correctness of the version of Jones. If Springer's version of the contract was correct, then he had no cause of action.

Froelich vs. Christie, 92 Northwestern Rep., was a cause wherein the facts are almost identical with the facts in the case at bar.

In the case at bar the main controversy was as to whether the contract included services rendered by Jones in the Supreme Court of the United States and rendered upon a second trial of the cause in the courts of New Mexico. Mr. Jones' version of the contract was that the contract did not include such services, while Mr. Springer's version was that they did include such services.

In the case above cited the "principal controversy" was as to whether the contract included the cutting of certain timber upon the east side of a certain creek. The plaintiff asserted that the contract only provided for the cutting on the west side of the creek. The defendant denied this, and asserted that the terms of the contract required the cutting on both the west and east side of the creek. The Supreme Court of Wisconsin, in reversing the case because the trial court had misdirected the jury in its instruction upon the burden of proof, and holding that the burden of proof was upon plaintiff, said:

> "It is claimed that there was an error in charging "the jury as to the burden of proof. The court was "requested to instruct the jury upon that subject. "The defendant claimed that the burden of proof "was on the plaintiff as to all material questions in "the case. The plaintiff claimed that the burden of "proof was on the defendant as to whether the con- "tract included the timber on the east side of the "creek, and as to whether the plaintiff had failed to "perform the contract. After hearing such claims "the court charged the jury as follows: 'The court "concluded to say that the burden of proof is not on "either party as to any of these questions; that you

"are to answer these questions according to the facts—
"according to the weight of the evidence. The bur-
"den is on neither party.' While the plaintiff's
"cause of action is based upon contract, yet his com-
"plaint fails to allege the terms of the contract.
"The answer contains a general denial. It also
"alleges, by way of a separate defense, that the
"services of the plaintiff were rendered under a
"special contract which the plaintiff had failed to
"perform, as indicated in the statement of facts.
"The plaintiff was a witness in his own behalf, and
"testified to the effect that the services for which he
"claimed judgment were under a contract with the
"defendant for cutting, skidding and hauling what
"logs there were on the west side of the creek; and
"that the contract did not include the logs on the
"east side of the creek; and that the R. Connor Com-
"pany had nothing to do with the contract; and that
"he did complete the contract as thus made. The
"defendant denied both propositions, and insisted
"that the contract included the timber on the east
"side of the creek, and that the completion of the
"job was to be such as would be acceptable to the R.
"Connor Company. On the trial the defendant con-
"ceded that, if the contract only included the timber
"on the west side of the creek, then it had been
"completed. The contract under which the plaintiff
"claims the right to recover, having thus been
"brought into the case, we are constrained to hold
"that the burden of proving the complete perform-
"ance of that contract was on the plaintiff. It fol-
"lows that the instructions thus given to the jury
"were erroneous."

In *Trust Co. vs. Seefke*, 144 N. Y., 354; 39 N. E., 358, the Court of Appeals of New York said:

"There is confusion sometimes in treating of the
"burden of proof arising out of inexact definitions.
"The burden is upon a plaintiff to establish his cause
"of action when it is in proper form denied by the
"other party. * * * It is very common to say
"in such cases that the burden is upon the defendant

"to establish the fact relied upon. All this can properly mean is that when the plaintiff has established "a *prima facie* case the defendant is bound to controvert it by evidence, otherwise he will be cast in "judgment. When such evidence is given, and the "case upon the whole evidence—that for and that "against the fact asserted by the plaintiff—is submitted to court or jury, then the question of the "burden of proof as to any fact in its proper sense, "arises, and rests upon the party upon whom it was "at the outset, and is not shifted by the course of the "trial; and the jury may be properly instructed that "all material issues tendered by the plaintiff must be "established by him by a preponderance of evidence. "See Davis *vs.* Jenney, 1 Met., 221; Simpson *vs.* "Davis, 119 Mass., 269. * * * The general rule "of pleading, which also accords with reason, is that "defenses which assume or admit the original cause "of action alleged, but are based upon subsequent "facts or transactions which go to qualify or defeat "it, must be pleaded and proved by the defendants; "and, on the other hand, the cause of action alleged "by the plaintiff and all its material incidents, must "be asserted and proved by him, and in both cases the "final event must be supported by a preponderance "of evidence in favor of the party tendering the "issue."

In *Scott vs. Wood*, 81 Cal., 398, 400, the court said:

"The case turned upon the question whether, dur"ing a portion of the period in which the plaintiff "rendered services his salary was $200 or $250 per "month. Upon this question the evidence was con"flicting. The defendant testified that the salary had "been fixed at $200 a month in the beginning of "1870, and the plaintiff testified that it had not. The "court instructed the jury in relation to the matter "as follows:

"'The jury are instructed that the defendants ad"mit employing the plaintiff on July 3, 1869, at the "rate of $250 per month, and that he worked for "them continuously until the first day of April, 1885;

"and that the burden of proof is upon the defendant
"to show that plaintiff's compensation was changed;
"that unless the defendants establish by a preponder-
"ance of testimony that plaintiff in 1870, or at some
"other time, agreed to work for defendants during
"the years 1870 and 1871, at the monthly compensa-
"tion of $200, then they must find for the plaintiff.'
"This was excepted to, and is specified as error.

"We think that the court erred in telling the jury
"that the defendant was required to have a pre-
"ponderance of testimony upon the question men-
"tioned."

And in *Homire vs. Rodgers*, 37 N. W., 972-974, the court said, the case being exactly in point on this question:

"The district court instructed that 'if defendant
"collected the money, claiming that the amount col-
"lected was simply the amount that was due him for
"the pasturage, the burden was on him to establish
"that he was entitled to all the money collected.'
"We think this instruction is erroneous. It puts
"upon defendant the burden of proving the truth of
"the representation upon which the money was paid
"to him. Whether that representation is true or
"false, depends upon whether the contract between
"the defendant and the intestate was as claimed by
"defendant or as claimed by plaintiff. Plaintiff
"alleged that under the agreement between defend-
"ant and the intestate the former was to receive forty
"cents per month for the pasturage; but defendant
"claims that he was to receive two dollars per head
"for the balance of the season, and he collected that
"amount from the owners of the cattle and repre-
"sented to them, when he made the collections, that
"that was amount due him. Now the burden was on
"plaintiff to prove his averment, and its establish-
"ment would necessarily prove the falsity of the de-
"fendant's claim; but, if the burden was on defend-
"ant to establish the truth of his claim, as the in-
"structions hold, it follows that plaintiff was relieved
"of the burden of proving his allegation The de-
"fendant pleaded affirmatively that, under the con-

"tract, he was to receive two dollars per head for "pasturing the cattle, but he was not required to do "that. The whole question as to what compensa- "tion he was to receive would have arisen under a "general denial of plaintiff's averments. The affirma- "tive allegation in the answer did no more than raise "that question; and the fact that the matter was "pleaded in that form does not change the rule as to "the burden of proof.

"For this error the judgment must be reversed."

In *Mott vs. Baxter* the Supreme Court of Colorado, 68 Pacific Rep., 220, considered the question of burden of proof in a cause wherein the facts were practically the same as in the case at bar. The court said:

"*Per Curiam:* This action was commenced before "a justice of the peace; consequently there are no "written pleadings. The party defeated before the "justice appealed to the county court, where the "plaintiff (appellee here) recovered the full amount "of her claim. From this judgment the defendant "appealed to the Court of Appeals, where it was "affirmed (Mott *vs.* Baxter, 13 Colo. App., 63; 56 "Pac., 192), and he now brings the case here for "review on appeal.

"One item of plaintiff's account is a balance for "services which she claims to have rendered defend- "ant in the capacity of stenographer from November "12, 1894, to December 21, 1895, at an agreed sum "per week. Her testimony on this subject is to the "effect that she entered into a contract with the de- "fendant by which she was to be paid a stipulated "price by the week or month for such time as she "was in his employ, and that she worked for him for "the period claimed under this agreement. Defend- "ant testified that about the 1st of June, 1895, the "original contract was terminated, and although she "remained at his office, and performed some services "for him, after that date, it was under an entirely "new and different arrangement from that originally "entered into. The court instructed the jury that

"the burden of proof was upon the defendant to es-
"tablish that the original contract of hire was re-
"scinded by mutual agreement. The question then
"presented is, Was the defense which the defendant
"interposed to the account of plaintiff, which accrued
"after the date he says the original contract of hire
"was terminated, affirmative, or was it simply a
"denial of indebtedness as to that part of her ac-
"count? If of the first character, then the instruc-
"tion was correct, for the burden rests upon the party
"who holds the affirmative of a proposition of fact
"(1 Greenl. Ev., 74; 5 Am. & Eng. Enc. Law, 2nd
"ed., 23); if of the latter character, then the instruc-
"tion was erroneous, for a simple denial tenders no
"affirmative issue. 'A statement of facts, by way of
"defense which are merely inconsistent with those
"stated by the plaintiff, is, in effect, a denial. It is
"not new matter. It admits nothing. It simply con-
"tradicts' (Bliss, Code Pl., 2nd ed., 333; Sylvis *v.*
"Sylvis, 11 Colo., 319; 17 Pac., 912). There being
"no written pleadings, the issues are defined by the
"evidence (Hincham *v.* Keener, 5 Colo. App., 300;
"38 Pac., 611); and it is from this source that the
"issue between the parties, so far as material to the
"instruction in question, must be determined. The
"statements of defendant directly contradict the
"claim of plaintiff that she had rendered services for
"him after about June 1, 1895, under the contract of
"hire. In other words, they contradicted her claim
"that the original contract which was the basis of her
"cause of action was in existence after that date.
"Her right to a recovery for the whole of the period
"she worked for defendant depended upon her prov-
"ing the continuance of her contract for that period.
"The testimony of defendant that the contract was
"not in existence after about June 1, 1895, did not
"relieve her from the burden of proving its con-
"tinuance after that date, for the reason that it was
"not an admission of indebtedness as to that part of
"her account. On the contrary, it negatived her
"statement in this respect. This being the effect of
"the testimony of defendant, the defense thereby
"interposed to her account of services after June 1,

"1895, must be treated as a denial of such indebted-
"ness, because that defense permits a defendant to
"prove any and all facts which tends to negative the
"averments, or some one or more of them, which a
"plaintiff is required to establish (Sylvis *v.* Sylvis,
"*supra;* Bliss, Code Pl., 2nd ed., 327; Pom., Rem.
"& Rem. Rights, 691; Steward *v.* Goodrich, 9 Mo.
"App., 125; 1 Enc. Pl. & Prac., 817). Therefore his
"defense to that part of her account was in no sense
"affirmative; consequently the burden did not rest
"upon him to establish a fact which merely sup-
"ported his denial of indebtedness to her account to
"which his testimony was directed. For this reason,
"it was clearly error to instruct the jury that the
"burden of proof was upon him to establish the re-
"scission to which he testified."

The Supreme Court of Massachusetts in the case of *Phipps vs. Mahon et al.,* 141 Mass., 471, passed upon the questions here discussed in a case precisely analogous to the case at bar. In the Massachusetts case, as in this, the plaintiff in his complaint declared on an implied contract. In that case, as in this, the defendants' answer was a general denial, *and in addition they admitted the employment of the plaintiff and alleged that it was at a price agreed, namely,* $100 (one hundred dollars), which had been paid.

The trial court in the Massachusetts case instructed the jury that "the burden of proof was upon the plaintiff to "prove his case, that the service was rendered and what it "was reasonably worth; but that if the defendants sought to "avoid paying for the services what it was reasonably worth "upon the ground that there was an agreed price, it must "be proved that the price was agreed; and upon that the "burden of proof would be upon the defendants." The defendants excepted to this instruction upon the burden of proof, contending that it was upon the plaintiff.

It will thus be seen that every question concerning the burden of proof in the case at bar was directly involved in

the cause before the Massachusetts court. Upon the decision of the question the Supreme Court of Massachusetts said:

> "The plaintiff relied upon the fact that he had "rendered certain valuable service for the defend- "ants at their request, and that such service was rea- "sonably worth the sum of $200, as establishing a "contract by the defendants to pay this sum. Such "is the legal interpretation of his declaration, which, "in form, was an allegation that the defendants owed "him a certain sum according to an account annexed. "The plaintiff did not claim that any fixed price had "been agreed upon, although, had this been the case, "such price might be recovered under a similar count "(Loew *vs.* Pimental, 115 Mass., 44). By denying "the allegations of the plaintiff's declaration, the de- "fendants put in issue, not merely the facts stated "but the existence of the contract which was the "legal inference therefrom, if no other facts appear. "While proof of these facts, with the aid of the legal "inference to be deduced therefrom, establishes a "*prima facie* case so far as proof of a contract is re- "quired, it does not change the burden of proof in "the case. The defendants relied upon an alleged "agreement between themselves and the plaintiff, by "which the latter was to do the work, the price of "which is sued for, under a special contract for a "sum certain, which the plaintiff had already re- "ceived. It was for the defendants to offer some evi- "dence to rebut the inference to be deduced from the "facts proved by the plaintiff. They did not seek to "avoid the contract alleged by the plaintiff, or the "effect of it, but to disprove its existence. While, "in form, their evidence was affirmative, the use they "sought to make of it was strictly negative, and was "for the purpose only of rebutting the plaintiff's "proposition as deduced from the evidence offered by "him. The burden was still upon the plaintiff to "prove the contract alleged by him, upon all the "evidence in the case. If we supposed this evidence "to be equally balanced he could not recover, as he "has failed to prove that which is essential. In an "action for labor and services rendered, where the

" plaintiff seeks to recover what they are reasonably
" worth, he cannot do so if the whole evidence leaves
" it in doubt whether they were not gratuitously ren-
" dered. The defendant, by asserting that they were
" so rendered and offering any legal evidence to that
" effect, meets the *prima facie* case of the plaintiff,
" and the issue is then to be determined upon the
" whole evidence.

" The instruction of the learned judge was there-
" fore, erroneous, in holding that, upon proof that the
" services were rendered and proof of what they were
" reasonably worth, the burden of proof was on the
" defendants to show that there was an agreed price
" therefor. The defendants did not, by their evi-
" dence, seek to set up an independent proposition or
" distinct case, but to meet that set up by the plain-
" tiff."

The above case completely disposes of the contention of plaintiff, that the court erroneously instructed as to the burden of proof.

III.

It is finally contended that the Supreme Court of New Mexico erred in affirming the judgment of the trial court.

This cause was tried to a jury and the issues were found in favor of the defendant. The judge who tried the cause and who heard all of the evidence, when appealed to for a new trial, refused to grant it and entered judgment upon the verdict. It is evident that the great inequality between the value of the services rendered and the amount paid suggested by plaintiff is much more apparent than real when it is considered that neither the court nor jury were impressed therewith.

And when we consider that Jones at the time of his em-

ployment was but twenty-eight years of age; that as many trials as were had were not necessarily contemplated by him when he accepted the employment for $500; that the value of the land in dispute was entirely problematical, because the extent of Dawson's claim was not fixed or determined and might have been by the jury fixed at 500 or 1,000 acres instead of 23,000 acres, and that part of the consideration, as testified to by Springer, was that he would give all his business to Jones, as well as such other business as he controlled, and that Jones received from that source more than $8,000 according to his own testimony, and $15,000 according to Springer's testimony, it does not appear that Jones was underpaid for the services rendered.

Very respectfully submitted,

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